

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the
District of Columbia

OCTOBER TERM, 1935

No. 6597

800

JOHN SPIERS, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA, A CORPORATION,

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

FILED NOVEMBER 11, 1935.

PRINTED DECEMBER 27, 1935.

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United States Court of Appeals for the District of Columbia

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vs.

DISTRICT OF COLUMBIA, A CORPORATION,
DEFENDANT IN ERROR.

IN ERROR TO THE MUNICIPAL COURT OF THE DISTRICT OF
COLUMBIA.

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United States Court of Appeals for the District of Columbia

No. 6597.

JOHN SPEIRS, Plaintiff in Error,

vs.

DISTRICT OF COLUMBIA, a Corporation.

1 Municipal Court of the District of Columbia.

No. A-11179.

JOHN SPEIRS, Plaintiff,

vs.

DISTRICT OF COLUMBIA, a Corporation, Defendant.

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, That in the Municipal Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

2 In the Municipal Court of the District of Columbia.

At Law.

No. A—.

JOHN SPEIRS, 2707 Adams Mill Rd. N. W., Plaintiff,

vs.

DISTRICT OF COLUMBIA, a Corporation, District Building,
Defendant.

Declaration.

Filed Mch. 5, 1935.

Plaintiff, John Speirs, sues the District of Columbia, a corporation for municipal purposes, for that, whereas, here-

tofore, to wit, on or about the sixteenth day of June, 1934, to wit, at or about 1 p. m., the plaintiff was walking or stepping from the sidewalk along the westerly side of Seventh street northwest (in front of 1906 Seventh street northwest known as Dunbar's market) in the direction of and for the purpose of crossing the street at a regular street car stop located on the said Seventh street along the side of the westerly car track at said point to the south of the intersection of Seventh street and Florida avenue northwest in the city of Washington, District of Columbia.

It became and was the duty of the defendant, then and there to keep and maintain the street between said sidewalk and street car track in repair and in safe condition and not dangerous in order that pedestrians and plaintiff might not be injured in walking from and passing over the said street between said sidewalk and the said car track but defendant unmindful of its said duty in the premises disregarded the same and by reason of the negligence of defendant, its agents, servants and employes to keep said sidewalk in reasonable repair and safe for pedestrians and for plaintiff, and in violation of said duty said defendant, its agents, servants and employes negligently suffered and permitted said street at the point aforesaid to become out of repair

and unsafe and dangerous and defective, to wit, in
3 that it permitted a large hole, about 18 inches in diameter and two feet long to be and remain for a long time in said street at said place, which negligent condition had existed for a long period of time of which defendant had notice. And plaintiff, while walking thereon in an easterly direction and while in the exercise of reasonable care he was by reason of having stepped in said hole, depression or indentation, violently precipitated and thrown upon the roadway of said street and gravely and seriously injured as result thereof, and by reason of said precipitation and falling, his left ankle was twisted, strained and sprained, and his clothing damaged and ruined.

Plaintiff has been compelled to expend and has expended various sums of money, to wit, \$23, in and about the endeavor to heal and cure himself of the bruises, injuries and pains suffered so as aforesaid contracted and sustained and has been prevented from working at his occupation as linotype operator for over three weeks, to the loss of \$190 in salary and also the loss of one palm beach suit to the value

of \$12.50 and he had endured great pain and suffering by reason of said injuries so received, all to the damage of the plaintiff, the said expenses being set forth in the particulars of demand attached hereto and made a part hereof.

Plaintiff further says that within six months after injury and damages aforesaid so sustained he, through his attorney, gave notice in writing to the commissioners of the District of Columbia, of the approximate time, place, cause and circumstances of such injury and damage.

Wherefore plaintiff sues defendant and claims the sum of one thousand (\$1,000) dollars besides costs.

CHARLES D. COUNCIL,
Attorney for Plaintiff,
 505 Insurance Bldg.

Bill of Particulars.

To money expended and damages for injuries sustained as set forth in the declaration hereto attached and made a part hereof:

Doctor's bill	\$15.00
To medicines, bandages, etc.....	8.00
Loss of salary—June 17 to July 10, 1934.....	190.00
Ruined suit of clothes.....	12.50
To damages for pain and suffering.....	774.50

Total sum claimed in this action by reason of defendant's negligence as shown in declaration	\$1000.00
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_____,
Atty. for Plaintiff.

4 In the Municipal Court of the District of Columbia.

At Law.

No. A-11179.

JOHN SPEIRS, 2707 Adams Mill Road, N. W., Plaintiff,

vs.

DISTRICT OF COLUMBIA, a Corporation, District Building,
Defendant.

Plea.

Filed April 18, 1935.

I.

Comes now the defendant, the District of Columbia, by its counsel, and for a plea to the declaration filed herein says that it is without knowledge or information sufficient to form a belief as to whether the plaintiff fell at the time and place alleged in the declaration, and denies that any accident or injuries suffered or sustained by the plaintiff were due to any negligence or failure of duty on the part of the defendant. The defendant is without knowledge or information sufficient to form a belief as to the injuries alleged to have been sustained by the plaintiff and, therefore, denies the same. Defendant denies each and every allegation of fact contained in said declaration not herein specifically admitted.

The defendant admits that it is required to exercise reasonable care to see that the streets and highways of the District of Columbia are maintained in a reasonably safe condition and that Seventh Street on, to wit, the 16th day of June, 1934, ran north and south in front of premises

5 1906 Seventh Street, Northwest. Defendant denies that the aforementioned street in front of said premises, or at any other point, was in a dangerous condition and the defendant denies that the said street at the point aforesaid was maintained or controlled in such manner as to be dangerous to pedestrians lawfully using said street. Defendant admits that the hole existed in said street at said point, but denies that it was dangerous to

traffic of pedestrians lawfully using the same. Defendant further denies that it permitted any dangerous condition in said street at the point aforesaid to exist for a long period of time prior to the 16th day of June, 1934.

Defendant denies that the said street on, to wit, the 16th day of June, 1934, and prior thereto, at the point alleged in the declaration was unsafe for the use of pedestrians, and the defendant denies that it had either actual or constructive notice of either an unsafe or dangerous condition in said street. It denies that it neglected or failed to perform any of the legal duties imposed upon it as alleged in the declaration.

II.

And for a further plea to said declaration the defendant says that the plaintiff was guilty of contributory negligence in this, that plaintiff negligently and carelessly failed and neglected to observe where he was stepping, and plaintiff negligently and carelessly failed and neglected to pass around and avoid the defect alleged to have existed in said declaration after he saw or by the exercise of reasonable care and prudence could have seen the same in time to avoid stepping into or over the same.

E. BARRETT PRETTYMAN,
Corporation Counsel;
 GEORGE D. NEILSON,
Assistant Corporation Counsel, D. C.,
Attorneys for Defendant.

6 *Directed Verdict for Defendant.*

May 28, 1935.

Mins. 90, p. 82:

Come now the parties hereto and a jury of twelve good and law- citizens of this District, to wit:

Curtis W. Jones
 Bernard J. M. McLarney
 Arthur E. Sullivan
 Bernard E. Watson
 Linneaus T. Savage
 Max Scher

John W. Crow
 Herbert N. Horner
 Harry B. Lord
 Albert G. Norton
 Robert C. Robey
 Herbert Levy

who are duly sworn to truly try the matters of differences herein between the plaintiff and defendant, and after this cause is heard and given to said in charge, they upon their oath say they find (directed at close of plaintiff's case) in favor of the defendant.

Judgment on Such Directed Verdict.

June 3, 1935.

Mins. 90, p. 91:

It appearing under Rule of Court that judgment on the verdict in this cause should be entered, it is so ordered. Wherefore, it is considered that plaintiff take nothing by this action, defendant go hence without day, be for nothing held and recover of plaintiff its cost of defense.

7 [Stamp: Filed Jun. 17, 1935. Municipal Court,
District of Columbia.]

UNITED STATES OF AMERICA, ss:

The President of the United States, to the Honorable Robert E. Mattingly, Judge of the Municipal Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Municipal Court, before you, between John Spiers, Plaintiff, and District of Columbia, Defendant, A-11,179, a manifest error hath happened, to the great damage of the said Plaintiff, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Court of Appeals for the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 20 days from the settling of the bill of exceptions, or within such additional time after the expiration of the 20 days as the court below or a judge thereof for sufficient cause shall allow; that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be

done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable George E. Martin, Chief Justice of the said Court of Appeals, the 17th day of June, in the year of our Lord one thousand nine hundred and thirty-five.

[Seal United States Court of Appeals for the District of Columbia.]

HENRY W. HODGES,
*Clerk of the United States Court of Appeals,
for the District of Columbia.*

Allowed by
CHAS. H. ROBB,
*Associate Justice of the United States Court
of Appeals for the District of Columbia.*

8 In the Municipal Court of the District of Columbia.

At Law.

No. A-11179.

JOHN SPEIRS, Plaintiff,

vs.

DISTRICT OF COLUMBIA, a Corporation, Defendant.

Assignment of Errors.

Filed June 21, 1935.

Plaintiff assigns error- as follows:

1. The Court erred in granting motion for a directed verdict for defendant.

2. The judgment entered on that verdict is error.

CHARLES D. COUNCIL,
Attorney for Plaintiff.

Received a copy of the foregoing on this 21 day of June, 1935.

G. S. NEILSON,
Attorney for defendant.
W. H. M.

9 In the Municipal Court of the District of Columbia.

At Law.

No. A-11179.

JOHN SPEIRS, Plaintiff,

vs.

DISTRICT OF COLUMBIA, a Corporation, Defendant.

Bill of Exceptions.

Be it remembered that at the trial of this case before Judge Robert E. Mattingly, and a jury in the Municipal Court, Dr. J. S. Arnold testified on plaintiff's behalf on direct and cross-examination, in substance, as follows:

Plaintiff telephoned witness on June 17, 1934 and requested him to come to plaintiff's home and examine and treat his left ankle for a sprain. Treated plaintiff's ankle from June 17 to July 2, 1935 and during said treatment observed the ankle was swollen and discolored, sensitive, painful and stiffened; witness prescribed that the ankle be bandaged, rubbed with liniments and rubbing alcohol; X-ray disclosed there was no fracture; his bill was \$15 and had been paid; that the ankle yielded to treatment and the lameness and soreness became less and the condition improved.

John Spiers testified in his own behalf on direct and cross-examination, in substance, as follows:

On June 16, 1934, at about 1 p. m., he was on his way to meet Mr. Thigpen and the two were going to see a baseball game at Griffith Stadium at Seventh and Florida Avenue, N. W. Plaintiff stepped off a street car, going south on Seventh Street, N. W., near the corner of Seventh and T Streets. He walked to the West sidewalk on Seventh Street and, as he stepped up on the sidewalk he passed over, or nearby, a depression in the street. He then turned around and stepped back from the sidewalk curb into the street and into the depression. He said if he had seen the depression in the street before stepping from the curb he

10 would not have stepped in it. His left ankle was sprained and his clothing damaged. He identified pictures which showed the depression to be about one foot from the sidewalk curb of Seventh Street. Plaintiff lost 18 days from his work, for which he received \$10 per day, or a total of \$180; that his overtime pay had he worked would have amounted to \$8 or \$10; the damage to the palm beach suit was \$12.50; he spent \$6 or \$8 for liniments, alcohol and bandages. He suffered sharp pain for several weeks after the accident and feels pain in the ankle on rainy days.

Thigpen testified in substance as follows:

He saw plaintiff get off street car, walk to the westerly sidewalk and fall when he turned and stepped back in the street again. Someone else helped plaintiff before he had time to get to him. They went to the baseball game and while there plaintiff's ankle swelled to about twice its normal size and plaintiff had to go home in a cab. Witness is employed by the Washington Herald and worked next to plaintiff and the latter lost over three weeks from his work on account of his sprained ankle.

Gilbert Oken testified for the plaintiff, in substance, as follows:

That his father owned and operated a meat market at 1906 Seventh Street, N. W. and witness was employed by him. He noticed the hole in the street between the street car safety zone and the sidewalk in the winter of 1933-34 and since until a short time after the accident. In the winter time, when snow and ice were on the ground, he saw wheels on trucks spin at the point of the depression in the street, when said vehicles started to pull away from the curb. He never saw an automobile accident at the point in question. The hole was about a foot long, 10 or 12 inches wide, and 3 or 4 inches deep. He took no measurements of the depression—his estimate as to its size being a guess.

William Diggs testified for the plaintiff, in substance, as follows:

11 That he worked in a shoe shine parlor near 1906 Seventh Street, N. W. and noticed the hole in the street where plaintiff fell during the winter of 1933-34 and up to the time of the accident and that the depression was

located between the street car safety zone and the sidewalk; it was about 12 inches wide and 18 inches long and 3 or 4 inches deep—these figures being based on guess and not on actual measurement.

Mrs. Spiers, wife of the plaintiff, testified on his behalf, in substance, as follows:

That when her husband came home from the baseball game on July 16, 1934, his left ankle was badly swollen and he went to bed and she had to seek the assistance of her sister in getting plaintiff out of bed as the pain was so great he was unable to get up himself; that she dressed the sprained ankle and otherwise carried out the doctor's orders in treating it.

Plaintiff rested.

Defendant made a motion for a directed verdict in its favor, and after oral argument, it was granted over objection and exception of plaintiff.

This is the substance of all testimony, and the Court granted a motion for a directed verdict for the defendant. Thereupon, plaintiff noted and exception and caused note to be made of his intention to apply for a writ of error at the time thereof.

And thereupon, and as all said exceptions were duly noted and allowed as aforesaid and duly entered upon the minutes of the Court and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein, which is hereby ordered, so that the petitioner may have its case reviewed on appeal, the petitioner by his attorney, moves the Court to sign and seal this, his bill of exceptions, to have the same force and effect as if each and every one of said exception- — been separately signed and sealed, which motion is

12 granted by the Court; and thereupon the petitioner tenders this, his Bill of Exceptions, and requests the Court to sign and seal the same, which is accordingly done, now for then, this the 30th day of October, 1935.

ROBT. E. MATTINGLY.

Approved.

CHARLES D. COUNCIL,
Attorney for Plaintiff.

GEORGE D. NEILSON,
Attorney for Defendant.

[Endorsed:] No. A-11179. John Spiers vs. District of Columbia. Bill of Exceptions.

13 In the Municipal Court of the District of Columbia.

At Law.

No. A-11179.

JOHN SPEIRS, Plaintiff,

vs.

DISTRICT OF COLUMBIA, a Corporation, Defendant.

Designation of Record.

Filed June 21, 1935

Clerk of Municipal Court of District of Columbia please prepare transcript of record on writ of error the following mentioned papers:

1. Declaration and bill of particulars;
2. Plea;
3. Directed verdict for defendant;
4. Judgment on such directed verdict;
5. Writ of error;
6. Assignment of errors;
7. Bill of exceptions and this designation.

CHARLES D. COUNCIL,

Attorney for Plaintiff.

Received a copy of the above designation of record, this the 21 day of June, 1935.

G. S. NEILSON,

Attorney for —.

W. H. M.

14 Municipal Court of the District of Columbia.

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, Blanche Neff, Clerk of the Municipal Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 13, both inclusive, to be a true and correct

transcript of the record, according to direction of counsel herein filed, copy of which is made part of this transcript, in Cause, At Law, No. A-11179, wherein John Speirs is plaintiff and the District of Columbia, a corporation, is defendant, as the same that remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 11th day of November, 1935.

[Seal Municipal Court of the District of Columbia.]

BLANCHE NEFF,
Clerk, Municipal Court, D. of C.

Endorsed on cover: Municipal Court, District of Columbia. No. 6597. John Spiers, plaintiff in error, vs. District of Columbia, a Corporation. United States Court of Appeals for the District of Columbia. Filed Nov. 11, 1935. Henry W. Hodges, Clerk.

(7186-C)

IN THE
**United States Court of Appeals
for the District of Columbia**

OCTOBER TERM, 1935

No. 6597

JOHN SPIERS, PLAINTIFF IN ERROR,

vs.

DISTRICT OF COLUMBIA, A CORPORATION,

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This case comes from the Municipal Court on writ of error from a judgment entered on a jury verdict directed by the court at the close of plaintiff's case in an action for personal injuries sustained by appellant (hereinafter called the plaintiff) when he stepped from the curb on the westerly side of Seventh Street, Northwest, into a depression about one foot from the curb.

The depression was between a regular street car stop and curb line on Seventh Street, between Florida Avenue and T Street, Northwest.

THE EVIDENCE

Appellant testified that at about 1 p. m., Saturday, June 16, 1934, he stepped off the street car in front of 1906 Seventh Street, Northwest, while on his way to meet Thigpen to go to a baseball game with him. After alighting from the street car he went west to the sidewalk, waited a few seconds, started to cross to the east side of Seventh Street. (R.8)

As he stepped from the sidewalk his left foot went into a depression in the street and he was thrown violently to the ground, suffering a severe sprain to his left ankle, and his clothing was damaged, and that if he had seen the depression he would not have stepped into it.

He identified pictures of the depression and further testified as to loss of time from work, damage to his palm beach suit, the doctor's bill, cost of medicine and the sharp pain which he suffered after the accident (R.9). His expenses and loss of wages on account of these injuries were \$225.50.

Thigpen testified that he saw plaintiff alight from the street car, walk to the west sidewalk, turn and step back into the street again and fall as he did so. That they went to the baseball game together and the ankle became so swollen that plaintiff had to take a taxicab home. (R.9.)

Dr. Arnold testified that he treated plaintiff for a sprain from June 17, to July 2, 1934, etc. (R.8.)

Gilbert Oken testified that he worked in his father's meat market at 1906 Seventh Street, Northwest, and said he noticed the hole in the street between the street car safety zone and the sidewalk, and during the winter of 1933-34 that he saw wheels of trucks spin around in the hole when there was snow and ice on the ground. That he estimated the size of the hole to be about a foot long and 10 or 12 inches wide and 3 or 4 inches deep. (R.9.)

William Diggs testified that he worked in a shoe shine parlor near 1906 Seventh Street, Northwest, and noticed the hole in the street where plaintiff fell during the winter of 1933-34 and up to the time of the accident and that it was located between the street car safety zone and the sidewalk and estimated it was about 12 inches wide and 18 inches long and 3 or 4 inches deep. (R.9-10.)

Mrs. Spiers, wife of the plaintiff, testified that he came home with a sprained ankle on June 16, 1934, and that she nursed him and otherwise carried out Dr. Arnold's orders. (R.10.)

ASSIGNMENT OF ERRORS

1. The court erred in taking the case from the jury and directing a verdict for the defendant.

Argument

First: Did the condition of this depression in the street (between 10 or 12 inches wide and 12 to 18 inches long and 3 or 4 inches deep) as shown by the testimony, raise a reasonable inference, to be decided

by the jury, that its existence in the winter of 1933-34, and for six months before the injury to the plaintiff, was in such a dangerous condition for a sufficient time prior to the time plaintiff fell in it to give the defendant constructive notice of its existence?

Second: Was the plaintiff guilty of contributory negligence because he did not go to a street intersection and cross the street or because he failed to observe the depression prior to stepping into it.

NOTICE

The motion of defendant's counsel to take the case from the jury and direct a verdict in defendant's favor at the close of plaintiff's case, admitted that all the testimony properly before the court and jury was true; and that every inference reasonably deducible from said testimony that might be favorable to the plaintiff must be determined in plaintiff's favor and against the defendant. This is too well settled to need argument or authority.

The admitted facts before the court on this appeal are as follows: The depression was about one foot from the sidewalk, 10 or 12 inches wide and 12 to 18 inches long and 3 or 4 inches deep and located between a street car safety zone and the west sidewalk on Seventh Street, Northwest between Florida Avenue and T Street, Northwest. (R. 8, 9, 10.) The depression was there during the winter of 1933-34. (R. 9, 10.) The plaintiff was injured by stepping into it on June 16, 1934.

The only reasonable inference that can be drawn from the condition of the depression at the time it was

first observed by witnesses, Oken and Digges, is that it had already been there prior to the time they first noticed it because it requires many months of normal wear and tear on brick and asphalt to make such a depression. These witnesses noticed the depression in the winter of 1933-34 and the plaintiff was injured by stepping into it on June 16, 1934. This definitely establishes its existence for six months prior to plaintiff's injury. (R. 8, 9, 10.)

In Potomac Power Co. and District of Columbia vs. Hemler, 45 Wash. L. Rep. 723, I quote what this court had to say on the question of constructive notice at page 724:

“With respect to the motion of the District of Columbia, the evidence shows that the uncovered box was in that condition in one of the thickly settled portions of the city for more than two weeks before the accident happened. This was sufficient to warrant the jury in finding that the District had, or should have had, notice thereof.”

In District of Columbia vs. Pierce, 44 App. D. C. 126; 43 W. L. R. 738, one witness testified (page 740) that when she was sweeping the sidewalk about six months before the accident the manhole cover tilted and the other evidence as to how long the condition had existed showed it to be a considerable time. This court said that this testimony was sufficient from which the jury might have found that it would have become known to the District of Columbia by reasonable careful inspection.

The depression which caused the injury to this plaintiff had been there over six months and was located in a thickly settled section of the city at a street car safety zone where hundreds of people walked daily to

and from street cars. Plaintiff was walking where he was lawfully permitted to go and was in no sense a trespasser.

In ¹⁰ Su. Ct. Rep. 990, District of Columbia vs. Woodbury, at page 995, the court says:

“The notice is either actual or constructive; the latter meaning that the District authorities, within the scope of their opportunities and money, being under an obligation to exercise a general supervision of the streets and to keep themselves informed about their condition, if a street remains in a dangerous condition so long that the authorities could not help, in the exercise of ordinary care and diligence, knowing that fact, and did not know it because they failed to exercise proper vigilance, then the law imputes notice in contemplation of law, and that is constructive notice.”

This case was followed by this court in Domer vs. District of Columbia, 31 W. L. R. 243.

CONTRIBUTORY NEGLIGENCE

Was the plaintiff guilty of contributory negligence because he did not go to a street intersection and cross the street or because he failed to observe the depression before stepping into it?

In Mosheuvel vs. District of Columbia, 191 U. S. 247, 31 W. L. R. 790, the plaintiff sued the District for damages suffered as a result of stepping into a water box 4 inches from her front door step. With knowledge of the situation the plaintiff elected, in descending the steps from her residence to the sidewalk to cross over a projecting, uncovered water box about 4 inches

square, with its outer edge about 4 inches from a line down from the tread of the step nearest the sidewalk to the ground, instead of avoiding the box by stepping to one side. The court held, that she was not, as matter of law, guilty of such contributory negligence as will defeat her action against the municipality to recover damages for personal injuries sustained by reason of her failure to clear the box.

A judgment entered upon a verdict directed by the trial court reversed.

The case before this court now is exactly parallel to the Mosheuvel case with the exception of the fact that our plaintiff did not know the depression was there. Had he had knowledge of it he still would have been under no duty to go to the intersection and cross or even to go around it, had he, as an ordinary prudent person considered himself able to step over it and tried. Under the Mosheuvel case he would still be entitled to have the jury pass on the question of contributory negligence.

The law in Mosheuvel case was cited and followed in

City of St. James vs. Stacy, 203 Fed. 35

Nat. Life Ins. Co. vs. McKenna, 226 Fed. 165

In personal injury cases involving contributory negligence the courts have consistently followed the rule that where there is testimony of a substantial character to go to the jury, it is always for the jury to determine the question of the preponderance of evidence. Cases sustaining this view follow:

Glaria vs. Washington Southern R. Co., 30

App. D. C. 559, 36 Wash. Law Rep. 187.

Gunning vs. Cooley, 57 Wash. Law Rep. 82.

Affirmed in 281 U. S. 90.

CONCLUSION

In conclusion it is stated that the trial court erred in taking this case from the jury and deciding for itself the questions of notice and negligence. There was ample evidence before the jury to raise a strong inference that the condition of the depression had existed for a sufficient time before the accident for the defendant, in the exercise of reasonable care and diligence, to have discovered and repaired it.

On the question of contributory negligence there is no law to support the trial court in its theory that the plaintiff was guilty of contributory negligence because he failed to see the depression or should have gone to a street intersection to cross.

In view of the foregoing it is submitted that the trial court improperly directed the verdict and should be reversed.

CHARLES D. COUNCIL,
Attorney for Appellant.

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

FILED FEB 12 1936

Henry H. Hodges

CLERK

No. 6597

**In the United States Court of Appeals
for the District of Columbia**

JOHN SPIERS, PLAINTIFF IN ERROR

vs.

DISTRICT OF COLUMBIA

BRIEF FOR DISTRICT OF COLUMBIA

E. BARRETT PRETTYMAN,

Corporation Counsel, D. C.,

GEORGE D. NEILSON,

Assistant Corporation Counsel, D. C.,

Attorneys for Respondents.

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**In the United States Court of Appeals
for the District of Columbia**

No. 6597

JOHN SPIERS, PLAINTIFF IN ERROR

vs.

DISTRICT OF COLUMBIA

BRIEF FOR DISTRICT OF COLUMBIA

STATEMENT OF THE CASE

This action was instituted in the Municipal Court of the District of Columbia claiming damages for personal injuries alleged to have been sustained by appellant spraining his ankle upon stepping into a depression in the street, about one foot from the curb, not at a crosswalk, on the west side of Seventh Street, north west.

At the conclusion of plaintiff's case, upon motion, a verdict for defendant was directed.

THE EVIDENCE

John Spiers testified in his own behalf on direct and cross-examination substantially that on June 16, 1934, at about one p. m. he was on his way to

meet Mr. Thigpen and the two were going to see a baseball game at Griffith Stadium at Seventh and Florida Avenue NW. Plaintiff stepped off a street car, going south on Seventh Street NW., near the corner of Seventh and T Streets. He walked to the west sidewalk on Seventh Street and, as he stepped up on the sidewalk, he passed over, or nearby, a depression in the street. He then turned around and stepped back from the sidewalk curb into the street and into the depression. He said if he had seen the depression in the street before stepping from the curb he would not have stepped in it. His left ankle was sprained and his clothing damaged. He identified pictures which showed the depression to be about one foot from the sidewalk curb on Seventh Street (R. 8).

Witness Thigpen testified plaintiff got off street car, walked to the westerly sidewalk and fell when he turned and stepped back in the street again (R. 9).

Gilbert Oken testified he noticed the hole in the street for several months, and that it was about a foot long, 10 or 12 inches wide, and 3 or 4 inches deep (R. 9).

William Diggs testified he noticed the depression in the street, and that it was about 12 inches wide and 18 inches long and 3 or 4 inches deep (R. 9).

Dr. J. S. Arnold testified he treated plaintiff's left ankle for a sprain, prescribing rubbing with liniments, etc., his bill being \$15.00 (R. 8).

ARGUMENT

I

Street reasonably safe for primary use

The only question at issue is whether the court erred in directing a verdict for the District of Columbia after the plaintiff had presented his case and after arguments by both counsel on the motion for a directed verdict.

The facts in the case before the lower court revealed the defect in the highway was so inconsequential, and when taken into consideration along with the plaintiff's own carelessness in not crossing the street at designated crosswalk and not observing where he was stepping, that the court in the exercise of its sound discretion was impelled to take the case from the jury.

The evidence produced at the trial by the plaintiff's own witnesses fails completely to show that the street in question was not safe for the purpose for which it was primarily intended. The strongest testimony on behalf of plaintiff with respect to the condition of the street was that of Gilbert Oken, who, however, admitted that he had never seen any automobiles in difficulty at the particular point in the street, except to the extent of merely seeing wheels spin when some vehicles

pulled from the curb, and then only when snow and ice were on the street. It is common knowledge that wheels will spin on even a flat surface when there is snow or ice on the ground.

It is respectfully submitted this case falls within a well established principle of law. The street in question being reasonably safe for the purpose for which it was primarily intended, to-wit, vehicular traffic, and the plaintiff having failed to exercise reasonable care to insure his own safety, there can be no liability on the part of the District of Columbia.

It is admitted that a pedestrian might cross a public street at any place he may choose. He is not under obligation to cross at a regularly designated crosswalk. However, it is likewise submitted he cannot assume that between crossings the street is as smooth and as safe as at crossings. The law as announced by this Honorable Court is that one has the right only to assume that the streets and sidewalks are reasonably safe for the use for which they are primarily intended.

On the strength of the case of *District of Columbia vs. Aukward*, 45 App. D. C. 155, the trial court was fully justified in taking the case from the jury, and this Court, in giving credence to its own decisions, can reach no other conclusion than that the action of the lower court was proper. In many respects the facts of the two cases are similar. The law set forth in the *Aukward* case is di-

rectly in point with the case under consideration and when considered in the light of the facts of the present case, there is no shadow of a doubt that the ruling of the trial judge not only was warranted, but was impelling. In the *Aukward case* the plaintiff, being on the westerly side of First Street, desired to take a north bound car on the easterly side of such street. (*In the case now before the Court the plaintiff was not crossing the street to catch a street car.*)

Although there was ample time for the plaintiff in the *Aukward Case* to catch the street car, she took the most direct route, diagonally across the street towards a point designated as a car stop, instead of going several feet north and crossing at the regular crossing at the intersection of First & C Streets. At a point about 7 feet east of the curb line in the street was an iron ventilating trap. (*In the case now before the Court the depression in the street was but one foot from the sidewalk curb.*) To the west of this trap, for the length of 18 inches and extending back from the trap 8 or 10 inches, the paving block had become depressed to a depth of about 3 inches. There was evidence that the depression had quite seriously affected automobiles and other vehicles passing over it. It was testified that "People going over would stumble, and teams passing over would jostle the drivers if they went over it in a hurry; that some drivers would hold up their teams as they passed over it. It caused great

jolting of the teams, and the people would bounce out of their seats." The driver of a bread wagon testified that it had caused his horse to stumble seriously upon one occasion.

In view of the above facts in the *Aukward Case* it was not contended that the evidence did not warrant a finding of negligence on the part of the District of Columbia, the question being whether plaintiff in crossing the street—to catch a street car—and failing to observe the depression in the street, was guilty of contributory negligence as to preclude her right to recover.

In analyzing the *Aukward case* for the purpose of applying the law as enunciated in that case to the facts of the case now before this Honorable Court, three distinct points must be borne in mind:

First. That the plaintiff, in the case now under advisement, in crossing the street at a point other than a regularly designated street crosswalk was not preparing to catch a street car. He chose to cross the street at a point other than at the crosswalk.

Second. The depression into which the plaintiff in this case stepped was not well out into the street, where it might be expected that he would have to be observing approaching traffic, rather than watching where he was stepping. It was immediately adjacent to the sidewalk curb—one foot—and his own testimony was to the effect that he did not

observe the condition of the street when he stepped up on the curb and then back into the street again.

Third. There was absolutely no evidence in the case now under consideration that the point in the street where plaintiff alleged that he stepped into the depression was dangerous to, or unsafe for, vehicular traffic. Indeed, it was not shown that it was even unsafe for pedestrians.

The learned Justice, Mr. Robb, in delivering the opinion of this Honorable Court, in the case of *District of Columbia vs. Aukward, supra*, upon which the District relied principally in its motion for a directed verdict in the court below, said:

The learned trial justice in his charge to the jury, to which there was no exception, said: "It is true that one walking where he has a right to walk, in the public street or on the sidewalk, has a right to assume, unless there is something to indicate to the contrary, that the District has performed its duty in providing a safe place, considering the purpose for which the street or sidewalk was made—in the case of the sidewalk, if it is safe for people to walk over, and in the case of the highway, if it is safe for vehicles to pass over. But when a person unnecessarily goes off of the sidewalk at a point not prepared for pedestrians, and undertakes to cross there, then of course the additional duty rests upon him to remember that it is a place prepared for vehicles, and not primarily intended for pedestrians, and the

presumption of safety would not extend any further than the use for which the place was built and is supposed to be kept in repair.”

Again, Mr. Justice Robb stressed the point that the District’s liability extends to the point of seeing that the street, or sidewalk, as the case may be, is reasonably safe for the use for which it was primarily intended. He said:

While he (a pedestrian) may not assume that the street between crossings is as smooth and safe for pedestrians as at crossings, he certainly has a right to assume that it is reasonably safe for the use for which it was primarily intended.

Mr. Justice Robb, in his concluding paragraph in the *Aukward Case, supra*, stresses the point that it was an uncontested fact that the depression was of such a character as to render the street unsafe for vehicular traffic and that the plaintiff could assume that it was reasonably safe for vehicular traffic but no more. In the case now under consideration the street was perfectly safe for vehicular traffic, giving the plaintiff the benefit of the most favorable interpretation of the testimony of his own witnesses.

This Honorable Court in the Case of *Howes v. D. C.*, 2 App. D. C. 198, held the law imposes a duty of exercising such a degree of care, at least, that would require some attention to the surface over which plaintiff was traveling. In that case, the plaintiff left the traveled portion of the sidewalk

and walked up to the window of the house where he was injured, the court stating:

* * * without taking precaution which every reasonable and prudent man would take of looking before him to see whether any of the obstacles to his progress existed * * * no man in the exercise of ordinary care and caution would have so acted; and there was nothing, in our opinion to be submitted to the jury.

Also, in the case of *D. C. v. Duryee*, 29 App. D. C. 332, this court recognized the necessity for the exercise of a greater degree of care for pedestrians when crossing at a place other than a street crossing.

Even in the case of sidewalks the plaintiff is under some duty to look where he is going, lest he be guilty of contributory negligence. *D. C. v. Haller*, 4 App. D. C. 405.

If John Spiers, the plaintiff in the case now before the Court, had looked in front of him, as required in the Haller opinion, and not far ahead, he would not have suffered the injury of which he now complains. *R. R. v. Gibson*, 97 Ga. 499, *D. C. v. Boswell*, 6 App. D. C. 407.

The plaintiff in failing to observe the condition of the street when he stepped from the curb can not excuse his neglect to watch where he was stepping on the grounds that he was watching for traffic, because it is obvious that he was far from the lane of traffic, the depression being one foot from

the curb, which is somewhat short of the ordinary step of a man.

White on Negligence of Municipal Corporations, page 382, cites the New York Case of *King v. Fort Ann*, 73 N. E. 481, as authority for the proposition that:

* * * if a traveler, without necessity, or for his own pleasure or convenience, deviates from the traveled track, it being in good condition, and in so doing meets with an accident from some cause outside of such track, the town will not be liable for the resulting damage.

In the case of *Rice v. Montpelier*, 19 Vt. 470, it was held that:

Where a traveler drove into a ditch three feet from the traveled path in the night time, it was held that the jury should have been instructed that, if they found that the plaintiff diverged from a traveled road without necessity, but merely for the purpose of having the benefit of the snow, or that his horse took the same direction from a natural instinct, or from inability to see the road on account of darkness, the town should not be held responsible for the consequences of the act.

In the case of *D. C. v. Brewer*, 7 App. D. C. 113, the court held that one who, with full knowledge of the defective condition of the sidewalk, crosswalk, or roadway, and of the risks incident to its use, voluntarily attempts to travel on it, when the

defect can easily and without substantial inconvenience be avoided by going around it, or taking the safer way, is not in the exercise of reasonable care, but assumes the risk, and cannot recover damages from the city for any resulting injury. In the *Brewer Case*, which is analogous to the case under consideration, this Honorable Court reversed the lower court for failure to direct a verdict for the District of Columbia.

II

Inconsequential defect

Inconsequential defects in the street furnish no basis for actions for damages for personal injuries. The slight depression in controversy obviously is inconsequential. Where an injury results from an alleged defect which is not of itself of such dimensions or character as to make an accident probable, it does not justify the *submission to the jury* of the question of the city's negligence. *Bohl v. Dell Rapids*, 15 S. D. 619, 91 N. W. 315; *Beltz v. Yonkers*, 149 N. Y. 67, 42 N. E. 401; *Ibbeken v. New York*, 94 N. Y. Supp. 568; *Grant v. Enfield*, 11 App. Div. 358, 42 N. Y. Supp. 107; *Hamilton v. Buffalo*, 173 N. Y. 72, 65 N. E. 944, 13 Am. Neg. Rep. 173; *Morgan v. Lewiston*, 91 Me. 566, 40 Atl. 545, 4 Am. Neg. Rep. 268; *Clifton v. Philadelphia*, 217 Pa. 102, 9 L. R. A. (N. S.) 1266, 118 Am. St. Rep. 906, 66 Atl. 159, 10 Ann. Cas. 537; *Dayton v. Glaser*, 76 Ohio St. 471, 12 L. R. A. (N. S.) 916, 81

N. E. 991; *Elam v. Mt. Sterling*, 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.) 512.

In *Dayton v. Glaser*, involving an alleged defect in a street consisting of a depression in a pavement four inches deep, extending over three or four square feet of surface, the supreme court of Ohio held that such defect was not of sufficient magnitude to render such street not in a reasonably safe condition for travel, and that negligence could not be imputed against the city by reason of the existence of such defect, on the ground that accidents could not reasonably be anticipated as happening by reason of such slight defect.

In *Grant v. Enfield*, 11 App. Div. 358, 42 N. Y. Supp. 107, where the injury resulted from a hole in the highway, basinlike in shape, several feet in length, and four inches deep, it was held that the city could not anticipate accidents which might happen by reason thereof.

In *Morgan v. Lewiston*, 91 Me. 566, 40 Atl. 545, 4 Am. Neg. Rep. 268, where the plaintiff was injured by stumbling at the junction of two sidewalks, where there was a difference of six inches in grade, the court ruled, as a matter of law, that the sidewalks were in a reasonably safe condition for travel, and that negligence could not be imputed to the city by reason of the existence of such defect.

In *Messenger v. Bridgetown*, 31 Can. S. C. 379, a mound of earth eight inches in height in a public street was held not to constitute a defect of suffi-

cient magnitude to charge the city with negligence in failing to keep its streets in a reasonably safe condition.

In *Clifton v. Philadelphia*, 217 Pa. 102, 9 L. R. A. (N. S.) 1266, 118 Am. St. Rep. 906, 66 Atl. 159, 10 Ann. Cas. 537, where an injury occurred by stepping into a rut some five or six inches deep and several feet long, across a highway, it was held that the accident had happened by reason of a slight defect from which danger was not reasonably to be anticipated, and that the municipality was not chargeable with negligence, the duty imposed by law only being to exercise ordinary care to see that the highway is safe for traveling.

We are of the view that the depression in the street in question was of such a character as that the city officials in charge thereof could not have reasonably foreseen or apprehended the probability of the happening of the accident to plaintiff by reason thereof.

A strong case in point is the New York Case of *Terry v. Village of Perry*, 92 N. E. 91, which deals with the liability of Municipal Corporations for defects in their streets and sidewalks. In its opinion the New York Court of Appeals cited the case of *Beltz v. City of Yonkers*, 148 N. Y. 67, 42 N. E. 401, where,

The plaintiff was injured by a fall occasioned by her stepping into a depression in the sidewalk. The depression was near the

middle of the sidewalk, and resulted from the edges of the stone being broken off and the broken parts removed. The depth of the depression was the same as the thickness of the stone, which was about 2½ inches. The surface area of the depression was about two feet two inches in length, by 7½ inches in width. It had existed four years, and it did not appear that any accident had resulted from such use. The court say: "It is scarcely necessary to repeat here what has often been said before that a city is not responsible for every accident that may happen in its streets resulting in personal injuries. With the greatest vigilance and the utmost foresight, there will still be accidents for which no one, in any legal sense, is to blame." * * * In *Hamilton v. City of Buffalo*, 173 N. Y. 72, 65 N. E. 944, the plaintiff stepped upon the edge of a hole or depression in a crosswalk and slipped into it and turned his ankle, causing an injury. The depression was caused by the wheels of heavily loaded trucks wearing off the flagstones where they came together so as to cause a rounded depression between the stones constituting the crosswalk, and also, into the pavement. As so formed it was about 34'' long, 12'' wide, and in the form of a V and about 4'' deep. The court again say: "The authorities of a city are not required to keep the streets in an absolutely perfect condition. * * * All kinds of pavements that heretofore have been discovered and

used are subject to wear and some displacements when used by heavily laden vehicles, and this cannot be prevented."

At the conclusion of the plaintiff's evidence in the *Hamilton Case* the trial court ordered a non suit. The Court of Appeals held the non suit proper.

The Court of Appeals in the *Terry Case* further pointed out that,

By the decisions we have mentioned and the language of the opinions therewith, this court has clearly held that municipalities are not, as a matter of law, responsible for injuries arising from slight depressions or differences of grade in walks.

The Supreme Court of Indiana discusses the very point under consideration in clear and unmistakable terms in the case of *Town of Gosport v. Evans*, 112 Ind. 133. The court said:

* * * Where a municipal corporation is required to exercise vigilance in keeping the streets and sidewalks in a reasonably safe condition for public travel, by night as well as by day, it is by no means an insurer against accidents, nor can it be expected to maintain the surface of the sidewalks free from all inequalities, and from every possible obstruction to more convenient travel. The contrary rule would or might burden municipal corporations beyond endurance. That the pavement may have become worn from use, or that bricks

therein may have become loose or displaced by the action of the elements, so that persons are liable to stumble, or be otherwise inconvenienced in passing, does not necessarily involve the municipality in liability, so long as the defect is readily discovered and easily avoided by persons exercising due care, or provided the defect be of such a nature as not of itself to be dangerous to persons so using the walk.

III

Contributory negligence

It has been held that a pedestrian who voluntarily and unnecessarily steps from a city sidewalk and steps into a hole is guilty of contributory negligence and cannot recover from the city for injuries received thereby. *Alline v. LaMars*, 71 Iowa 654.

Likewise a person injured by falling in an excavation in a public highway cannot recover unless he exercised ordinary care to avoid the injury. *Schonhoff v. Jackson*, 97 Mo. 151. The court in *Massey v. Columbus*, 75 Ga. 658, held that if a person could have avoided injury from the existence of an open sewer in the middle of the street, by the use of ordinary diligence, the city would not be liable therefor.

No person can recover compensation for an injury that is sustained in consequence of the fault or neglect of another person or corporation, if he has by his own fault or neglect contributed directly

to produce that injury. *Hogue v. Chicago*, 32 Fed. Rep. 365. *Houston v. Vicksburg*, 39 La. Ann. 796. *Neier v. Mo. Pacific*, 4 West. Rep. 599.

In the cases of *Louisville v. Yniestra*, 21 Fla. 700, and *Lilley v. Fletcher*, 81 Ala. 234, the courts held that though a person may be guilty of a negligent act from which injury results to another, yet, if the person injured could by ordinary prudence have prevented the injury he cannot recover damages.

If a traveler, unnecessarily, for his own convenience, deviates designedly from the highway, and in so doing meets with an accident outside of the highway, the city cannot be responsible, no matter how near the highway the obstruction may be. *Biggs v. Huntington*, 32 West Va. 55.

In the *Neier Case*, *supra*, the court pointed out that it is not essential to the defense of contributory negligence that the plaintiff should have been in any degree the cause of the act by which he was injured; it is enough to defeat him if the injury might have been avoided by his exercise of ordinary care.

It will not avail the plaintiff that he was not fully aware of his danger; for the plaintiff is bound to know where the circumstances are known to him, or the hazard is apparent to a reasonably prudent man. *Pa. R. Co. v. Henderson*, 43 Pa. 449; *Southern R. Co. v. Kendrick*, 40 Miss. 374.

Likewise, it has been held that where a person guilty of contributory negligence is injured, he cannot recover without showing gross negligence or wantonness on the part of the other party. *Kennedy v. Denver, S. P. & R. R. Co.*, 10 Col. 493.

The authorities are well settled on the point that the question of negligence, or no negligence, is one of law for the court, where but one inference can reasonably be drawn from the evidence. *D. C. v. Moulton*, 182 U. S. 576. The United States Supreme Court in the case of *Mosheuvel v. D. C.*, 191 U. S. 247, in discussing this subject, stated further:

* * * The elementary law is that issues of fact are to be decided by the jury. But where the probative facts are undisputed, and where all reasonable minds can draw but one inference from them, the question to be determined is one of law for the court. *Marande v. Texas and P. R. Co.*, 184 U. S. 173.

The principal case relied on by counsel for the plaintiff is that of *Mosheuvel v. D. C.*, *supra*. In that case the plaintiff sued the District for damages suffered when she stepped into a projecting, uncovered water box in the sidewalk four inches from her front door step. The court held that she was not as a matter of law guilty of such contributory negligence as to defeat her action against the municipality to recover damages for personal injuries sustained by reason of her failure to clear the box. It is obvious that the court in the *Mosheu-*

vel Case was dealing with an entirely different set of facts than those involved in the case now under consideration. In that case there was a serious defect in the sidewalk which had existed for a long time, and of course it is clear that the District had knowledge of the dangerous condition of the sidewalk—having in mind the purpose for which said walk was primarily intended.

In the case now before this Honorable Court the defect, in light of authorities above cited, clearly is of an inconsequential nature, and was not in the sidewalk, but in the street which is primarily intended for vehicular traffic. The authorities clearly substantiate the fact that even if a defect of the dimensions of the case now under consideration were in the sidewalk, instead of the street, that it would be an inconsequential defect, and to hold the municipality liable, where this slight defect is in the street and not in the sidewalk, would be imposing an undue burden on the District of Columbia.

The following words of Mr. Justice Morris in the *Howes Case, supra*, can be applied with all of their force to the case now under consideration:

In order that the question of contributory negligence should become one of law for the court, it is evident that two conditions must concur. First, there must be no substantial controversy in regard to the facts that constitute the alleged contributory negligence; for such controversy would at once relegate the question to the jury, and, secondly, the

facts must be such that from them reasonable men, in the exercise of a dispassionate and impartial judgment, could draw but one conclusion. There is no substantial controversy in the present case in regard to the facts; they are positively ascertained and undisputed. They depend entirely on the testimony given on behalf of the plaintiff, for it seems that the defendant offered no testimony. Are these facts such that only one reasonable inference can be drawn from them, and that inference to the effect that the plaintiff was not in the exercise of ordinary care and caution when the accident occurred by which he was injured. * * * If upon the testimony now before us, the case had been submitted to the jury, and the jury had rendered a verdict for the plaintiff, we think it would have been not only the right, but the duty, of the court to set aside the verdict.

CONCLUSION

In conclusion, it is respectfully submitted that the trial court committed no error in taking the case from the jury and in directing a verdict for the District of Columbia, because:

First. The defendant was guilty of contributory negligence in not exercising ordinary care and prudence.

Second. The street was reasonably safe for the purpose for which it was primarily intended, namely, vehicular traffic.

Third. The defect in question was of an inconsequential nature.

Fourth. Admittedly the trial court is clothed with discretion to direct a verdict in a proper case and clearly the facts as revealed in the Bill of Exceptions left the trial court with no other alternative than to take the case from the jury.

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